No. 16,354

United States Court of Appeals

For the Ninth Circuit

JOHN D. BUDKE,
Appellant,

vs.

KAISER-FRAZER COMPANY OF ANCHORAGE,
Appellee.

Appeal from the District Court, District of Alaska, Third Division

BRIEF OF APPELLEE

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I

STATEMENT AS TO PROCEEDINGS AND JURISDICTION

This is an appeal taken by John D. Budke, appellant (plaintiff in the District Court), from an order entered by the District Court for the District of Alaska, Third Division, on December 10, 1958. The District Court ordered dismissed a certain order to show cause, issued by that Court on the 7th day of November, 1958, directed to Northwest Auto Sales, Inc., an Alaska corporation, appellee herein, in Cause No. A-10,327, District Court, District of Alaska, Third Division, entitled John D. Budke, petitioner, v. Kaiser-Frazer Company of Anchorage, defendant. The order to show cause is found at page 20 of the

record. The order dated December 10, 1958, dismissing the order to show cause, and from which this appeal is taken, is found at page 32 of the record.

Jurisdiction of the District Court was conferred by title 48, U.S. Code, Sec. 101 (See also Alaska Compiled Laws, Annotated, 1949, 53-1-1). Practice and procedure in the District Court was governed by the Federal Rules of Civil Procedure.

Jurisdiction of this Court to review the judgment of the District Court is conferred by Title 28, U.S. Code, Secs. 1291 and 1294. In procedural matters this appeal is governed by the Federal Rules of Civil Procedure.

Appellee does not contest the jurisdiction of this Court to hear appeals from orders of the District Court for the District of Alaska which were entered prior to January 3, 1959. Appellee does question the jurisdiction of this Court in this matter in that it is believed the order of the District Court from which the appeal is taken is not an appealable order.

II

STATEMENT OF CASE

This appeal is from an order entered December 10, 1958, by the District Court for the District of Alaska, Third Division, in Case No. A-10,327 of that Court (R 32). The District Court action was entitled John D. Budke, petitioner, v. Kaiser-Frazer Company of Anchorage, defendant. For the sake of brevity

this action will be called "the Budke case" in this brief and the District Court for the District of Alaska, Third Division, will be called "the District Court".

The order from which this appeal was taken denied a motion of appellant Budke for issuance of a special execution against certain real property, situated in Anchorage, Alaska, described as Lot 4 in Block 19 of the East Addition to the Original Townsite of Anchorage, Alaska. Such property will be described herein as "the property".

The decision of the District Court in making the order from which the appeal was taken, depended in part upon the record in another case of the District Court, No. A-9729, entitled First National Bank of Anchorage, a corporation, plaintiff, v. Kaiser-Fraser of Anchorage, Inc., Audrey I. Cutting, the United States of America, Territory of Alaska, and John D. Budke, defendants. That case was a mortgage foreclosure suit involving the property. For convenience herein we will call that suit "the foreclosure suit".

The defendant Kaiser-Fraser of Anchorage, Inc. named in the foreclosure suit was an Alaska corporation. We will refer to it in this brief as "the corporation".

John D. Budke was named as a defendant in the foreclosure suit and is the appellant in this matter. We will call him "Budke".

Northwest Auto Sales, Inc. is an Alaska corporation and is the appellee herein. It will be called "Northwest" in this brief.

The Budke case resulted in a judgment of the District Court entered October 11, 1954 (R 3) confirming an award made by the Alaska Industrial Board in favor of Budke and against Budke's employer, Kaiser-Frazer Company of Anchorage. That company will be designated herein as "the employer".

It will be necessary to detail various matters with reference to the title to the property and concerning the Budke case and the foreclosure suit in order that the Court may have a full understanding of the action of the District Court with reference to its order entered December 10, 1958, and relative to this appeal. Some of such matters are disclosed by the printed record. Some are before the Court in the original file in the Budke case but were not designated or printed. Some are in the original file of the foreclosure suit which was adopted by reference in the District Court proceedings relative to the matter.[1] Some are not in

[1]In the District Court, appellee Northwest based its defense to the order to show cause on all of the records and files of the foreclosure suit and of the Budke case. By reference it made all of the records of both cases a part of the show cause proceedings in the Budke case and requested the Court to take judicial notice of the matters contained in such records (R 22, 27). Appellant failed to designate any record on appeal and the clerk of the District Court transmitted the original papers in the Budke case as the record on appeal. The original papers in the foreclosure suit were not forwarded. The designation of record made by appellant in this Court on February 18, 1959 included only a portion of the record in the Budke suit. Documents so designated, together with additional documents designated by the appellee, constitute the printed record. Appellant by motion dated July 23, 1959, sought to enlarge the record to include certain documents in the foreclosure suit. This Court denied that motion for lack of jurisdiction. Appellant has attached a copy of an opinion of the District Court, dated April 4, 1956 (139 F. Supp. 346), as rendered in the foreclosure suit, as an appendix to his brief.

the file of either the Budke case or the foreclosure suit but are matters of public record in the District Court[2] or in the recorder's records.[3]

The property was owned on January 8, 1952, by one Nels O. Nelson. On that date, Nelson, by warranty deed, conveyed the property to the corporation. This deed was recorded in the records of Anchorage Recording Precinct, at Anchorage, Alaska, on August 7, 1952 (R 24, 28, 29).

On April 20, 1953, the corporation, as owner of the property, mortgaged the property to the First National Bank of Anchorage. The mortgage was recorded on April 23, 1953, in the records of Anchorage Recording Precinct at Anchorage, Alaska, (R 24, 29).

The United States of America on June 1, 1953, and again on January 8, 1954, through the Commissioner of Internal Revenue recorded certain liens for taxes, penalty and interest against the property belonging to the corporation. The liens totalled approximately $14,000.00 plus penalty and interest. The Territory of Alaska through its tax commissioner on February

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[2]Cause No. A-15,271 of the District Court entitled Northwest Auto Sales, Inc., an Alaska corporation and Karl V. Holmberg and Julian Longoria, plaintiffs, v. John D. Budke, defendant, was filed November 29, 1958. Budke has answered the complaint and the matter is at issue. The suit is one for "strict foreclosure" against Budke to litigate his alleged interest in the property and to give him a chance to redeem from the foreclosure suit sale if he so desires.

[3]Claim of lien by Budke, hereinafter mentioned, recorded December 17, 1953, Records of Anchorage Recording Precinct, Labor Lien Book #1, page 280. Copy of this claim is attached hereto as Appendix No. 1.

8, 1954, recorded certain liens for taxes, penalty and interest against the property belonging to the corporation. Such liens totalled approximately $1900.00 plus penalty and interest.

The judgment in favor of Budke, and against the employer, was entered ex parte by the District Court pursuant to 43-3-17, A.C.L.A. 1949, on a certified copy of an award made by the Alaska Industrial Board on September 7, 1954. The award by the Industrial Board was based on injuries supposedly suffered by Budke on October 11, 1953, while driving an automobile owned by the employer.

Budke filed a claim of lien with the recorder at Anchorage, Alaska on December 17, 1953, instrument number 9447, recorded in Labor Lien Book No. 1 at page 280. Copy of this claim is included as Appendix No. 1 herein. Budke never at any time filed a suit in equity for the foreclosure of any lien which he may have claimed under the provisions of 43-3-5, A.C.L.A. 1949.

The mortgage given by Kaiser-Fraser of Anchorage, Inc. to the First National Bank of Anchorage, Alaska, above described, was foreclosed by the First National Bank of Anchorage, Alaska because of non-payment of the note secured by such mortgage (R 24, 29). The foreclosure suit was commenced in the District Court as No. A-9729 and as above set out, is called "the foreclosure suit" herein.

In the foreclosure suit the United States of America, the Territory of Alaska and Budke were all

named as parties defendant as claiming some lien against the property. The complaint alleged that the liens of these parties against the property, if any, were inferior to the mortgage held by the First National Bank of Anchorage. Service of process was had on the United States of America and on the Territory of Alaska and they appeared in the action. Publication of summons was made against defendant Budke, but he did not appear in the action and default was entered against him.

The District Court, on October 12, 1955, entered Findings of Fact in the foreclosure suit and found that the mortgage held by the First National Bank of Anchorage was a first and prior lien against the property, and that the claim of the United States of America had second priority and the claim of the Territory of Alaska had third priority. Paragraph Nine of such Findings of Fact and Conclusions of Law found that the defendant John D. Budke claimed some right, title and interest in the property but that such claim was inferior and subsequent to the lien of the mortgage held by the First National Bank of Anchorage. The decree foreclosed the mortgage held by the First National Bank of Anchorage and directed the United States Marshal for the Third Division of Alaska to sell the property according to the practice of the Court and in accordance with law. The decree also provided that the interests of all the defendants in the property were forever barred and foreclosed except as to the equity of redemption provided by statute and that the purchaser of the property at the Marshal's Sale should

be put in possession of the property and that after expiration of the period of redemption that the United States Marshal should execute a deed conveying the property to the purchaser at the foreclosure sale. The decree furthermore provided that if the property was sold for more than enough to pay the judgment rendered in favor of the First National Bank of Anchorage, including interest, costs and attorney's fees, that the balance of the proceeds of the sale, should be deposited in the registry of the Court for further determination with reference to the priority of the United States of America and the Territory of Alaska. As directed by the foreclosure decree, the United States Marshal proceeded to advertise the sale of the property.

On November 18, 1955, attorney James K. Tallman appeared in the foreclosure suit on behalf of Budke. He filed a motion supported by his affidavit which was to the effect that no mailing of a copy of order for publication of summons or any summons had been mailed to Budke in the foreclosure suit as required by law. He stated that Budke had a valid and meritorious defense to the action in that he had a judgment dated October 11, 1954 "which said judgment was based upon the lien made prior and paramount and superior to any other lien by statute" upon the property. This was followed by a supplementary motion by Mr. Tallman, as attorney for Budke, which prayed that the judgment entered by the District Court on October 12, 1955 in the foreclosure suit should be set aside on the ground that Budke had a

meritorious defense to the action in that "he has a judgment, dated October 11, 1954, which said judgment was based upon a lien made prior and paramount to any other lien by statute and that defendant was, from lack of knowledge, prevented from appearing". This motion was supported by another affidavit by Mr. Tallman to the effect that he was informed and believed that the First National Bank of Anchorage, had not used diligence in attempting to locate Budke, because the firm of Bell & Sanders, attorneys for Budke, on behalf of Budke, had notified the First National Bank of Anchorage of the lien claim filed by Budke and claimed that the Bank had knowledge and notice that the firm of Bell & Sanders represented Budke in some matters. The motion was also supported by an affidavit of Ernest P. LaBate to the effect that on January 14, 1954, he had personally served upon several banks, including the Frst National Bank of Anchorage, a certified copy of a certain claim of lien by John D. Budke.[4] Arguments were had on November 25, 1955 on the various motions filed for Budke. The Court took the matter under advisement.

The United States Marshal sold the property to Northwest on the 5th day of December 1955 for the sum of $13,004.00 under the directions contained in the decree of foreclosure entered in the foreclosure

[4]The affidavit by Mr. LaBate states that a true copy of the claim of lien of John D. Budke is attached. A check of the records of the clerk of the District Court diseloses that no claim of lien is attached to the LaBate affidavit and that none is in the file. However, the lien claim was recorded as hereinabove set forth and a copy is attached hereto as Appendix No. 1.

suit. On February 3, 1956, the clerk of the District Court under order of that Court paid to First National Bank of Anchorage the proceeds of the Marshal's Sale less the Marshal's costs and commissions.

Meanwhile on December 15, 1955, John D. Budke, through James K. Tallman, his attorney, made a motion to the District Court, in the foreclosure suit, in which he requested that the Court rescind the sale of the property which had been made by the United States Marshal on December 5, 1955. He also requested that the Court deny confirmation of the sale when motion for confirmation should be presented to the Court. The motion was based on the previous motions and affidavits made on behalf of Budke in which he had attempted to have the decree set aside because he had not been properly served with summons in the action. Argument was had on that motion on January 5, 1956 and the Court reserved decision. On January 26, 1956, an affidavit dated January 21, 1956, executed by Budke was filed with the Court in the foreclosure suit. The affidavit was to the effect that Budke had never been served with process with reference to the foreclosure suit. In the affidavit he asked that any orders and judgments in the action might be set aside in order that he might have counsel and appear and protect his interests.

On February 2, 1956, the District Court rendered oral decision denying motion to set aside the judgment and motion to refuse confirmation of sale, and motion to rescind the sale. In the same opinion the

Court found that service of process upon Budke was not sufficient, for reasons that would be set forth in a written opinion to be finalized at a later date (minute order entered by the Court February 2, 1956, G 44, page 157). This was followed by written opinion of the Court dated April 4, 1956, 139 F. Supp. 346, copy attached to appellant's brief as an appendix.

On June 22, 1956, the First National Bank of Anchorage, Alaska, the plaintiff in the foreclosure suit, moved for confirmation of the foreclosure sale. Service of copy of the motion for confirmation was acknowledged by attorneys for Budke. No further appearance was made on behalf of Mr. Budke with reference to the order for confirmation of sale. The sale was confirmed on July 6, 1956 by order of the District Court entered in G 46, page 367 of the Court records.

Budke caused execution to be issued by the District Court on May 24, 1955 in the Budke suit. That execution was recalled and returned by the United States Marshal at the request of Budke's attorneys and was never levied.

No redemption was had from the Marshal's sale on foreclosure and the Marshal conveyed the property to Northwest, purchaser at the Marshal's sale, by Marshal's deed, on July 15, 1957. This deed was recorded on July 16, 1957 in the Records of Anchorage Recording Precinct at Anchorage, Alaska (R 25, 29).

On November 21, 1957, execution was issued by the District Court in the Budke suit (R 5). The United States Marshal executed the writ by delivering a copy

thereof to Edward R. Meekins, the occupant of the property, and noticed the property for sale for the 24th day of February, 1958 (Return of Marshal, R 15). Northwest, owner of the property, executed a third party claim to the property on February 4, 1958 and delivered it to the Marshal (R 10, 11). This third party claim was accompanied with the affidavit of Edward R. Meekins, President of Northwest, as to the title claim of Northwest (R 12). The United States Marshal notified Budke's attorney of the third party claim and allowed a period of five days to post indemnity bond required by law (R 8, 9 and 16). Thereupon, Mr. Tallman as attorney for John D. Budke, moved that the Court enter an order enjoining the United States Marshal from releasing the levy made against the property (R 6, 7). This motion was accompanied by affidavit of Mr. Tallman as attorney for Budke. The motion was not heard and was subsequently abandoned. No indemnity bond was posted. The Marshal cancelled the proposed sale of the property and released the execution (R 16).

On November 7, 1958, attorneys for Budke, in the Budke suit, filed a motion requesting that Northwest be required to show cause as to why the property should not be levied upon and ordered sold to satisfy the judgment in the Budke suit (R 17). The motion was accompanied by an affidavit filed the same day (R 18). The District Court issued an order to show cause, directed to Northwest, along the lines requested by the motion (R 20). Meanwhile, the property had been sold and conveyed by Northwest to Karl V.

Holmberg and Julian Longoria on February 25, 1958, by deed recorded May 5, 1958 (R 23, 30).

Northwest made return to the order to show cause (R 22), accompanied by affidavit of Edward R. Meekins, its president, setting forth the record as to the title to the property from January 8, 1952 to the month of November, 1958 (R 28). The title records of Anchorage Recording Precinct at Anchorage, Alaska, disclose that the employer never at any time had title to the property (R 23, 30).

The show cause proceedings were heard on November 17, 1958 and argument was had on behalf of the respective parties. The Court rendered its oral decision directing dismissal of the order to show cause on November 18, 1958 (R 31). It followed the oral opinion with a formal order of dismissal entered on December 10, 1958 (R 32).

Notice of appeal from the order of November 18, 1958 was filed on behalf of Budke on December 18, 1958 (R 33). Appellant did not file any designation of record. The clerk of the District Court forwarded the entire record in the Budke suit to the Court of Appeals under his certificate dated January 23, 1959 (R 35). The record was filed with the Court of Appeals on January 26, 1959 but was not docketed until February 9, 1959, when appellant paid the required docket fee (R 36). Appellant never filed a statement of points on which he intended to rely. He did file with this Court what he called "specifications of error" on or about September 10, 1959 (Brief 7).

On November 29, 1958, Northwest, Holmberg and Longoria as plaintiffs, commenced an action against Budke as defendant. The action is Number A-15,271 of the District Court. The complaint prays that Budke set forth his claim, if any, to the property and that the Court find that the claim of Budke to the property may be held to be secondary and subordinate to the claim of the plaintiffs to the property and that Budke be given a specific time to redeem the property from the foreclosure sale, if it be determined that he has any interest in the property. Budke has answered the complaint and the matter is at issue.

Budke has not filed any cost bond with reference to this appeal.

III

SUMMARY OF ARGUMENT

This appeal should be dismissed for technical reasons because of the failure of the appellant to comply with the Federal Rules of Civil Procedure, or with the rules of this Court, pertaining to appeals.

This appeal should be dismissed for the reason that the order entered by the District Court on December 10, 1958 is not a "final decision" within the meaning of Section 1291 of Title 28, U.S.C., and accordingly the order is not an appealable order. This appeal is without merit because, as a matter of law, on the record which was before the District Court, appellant had no right to levy execution against the property or to have the property sold at execution:

A. Because the judgment in the Budke case created no lien against the property.

B. If appellant, as the judgment creditor in the Budke suit, desired to sell the property at execution sale, he should have posted indemnity bond as required by law upon third party claim to the property being filed and proceeded thereafter to litigate title to the property with Northwest, the appellee herein, the occupant and then the owner of the property.

The show cause proceedings would not and could not have finally settled anything between Budke and the owners of the property. The only way this matter can be finally settled is by litigation between the parties. The pending District Court action, in which all parties are before the Court, will finally settle the rights of the parties to the property.

The order entered by the District Court was proper and in fact was the only order which the Court could have entered on the record established in that Court. Accordingly, this appeal should be dismissed or in the alternative this Court should affirm the action taken by the District Court.

IV

ARGUMENT

This appeal should be dismissed by this Court for various technical reasons because of the failure of appellant to comply with the Federal Rules of Civil Procedure and with the rules of this Court, with reference to appeals as follows:

(1) No bond for costs on appeal was filed with the notice of appeal, or at all, as required by Rule 73(c) of the Federal Rules of Civil Procedure.

(2) The record on appeal was not docketed within forty days after filing of notice of appeal as required by Rule 73(g) of the Federal Rules of Civil Procedure. No request was made either to the District Court or to this Court for extension of time for docketing the record and no extension of time was granted by either Court.

(3) Appellant has failed to designate sufficient of the record considered by the District Court so that this Court can intelligently consider the matters which were before the District Court on the show cause proceeding and with reference to its order dated December 10, 1958. The judgment of the District Court is presumptively correct and the Court of Appeals will indulge all reasonable presumptions in support of the ruling of the trial court. (*Pasadena Research Laboratories v. United States,* C.A. 9, 169 F. (2d) 375, 380, *certiorari* denied 335 U.S. 853. *Henderson v. United States,* C.A. 9, 143 F. (2d) 681, 682.) It is the duty of appellant to designate the contents of the record and he should designate enough to permit a full presentation of his points. (Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Section 1582, Notes 11 and 12 and cases there cited.)

(4) Appellant has failed to file with the clerk of this Court a "concise statement of the points on which he intends to rely", in violation of Rule 17 of this Court.

(5) Appellant has filed with this Court what he designates as "specifications of error" in an

attempt to comply with Rule 18(d) of this Court. However, the so-called "specifications of error" is merely a statement that the District Court erred in refusing to issue the special execution after the United States Marshal refused to act upon an execution regularly issued. It does not set forth any specifications at all as to how or in what manner the District Court is alleged to have erred in making the ruling from which the appeal is taken (See *Lowe v. McDonald,* C.A. 9, 221 F.(2d) 228; *Hargraves v. Bowden,* C.A. 9, 217 F.(2d) 839 and *Toguri D'Aquino v. United States,* C.A. 9, 192 F.(2d) 338, 348, *certiorari* denied, 343 U.S. 935, rehearing denied, 345 U.S. 931).

In passing, may we suggest that the judgment entered by the Court in the Budke case on October 11, 1954 (R 3) may very well be void for uncertainty. For instance, by paragraph 1(a) Mr. Budke was to receive compensation for temporary total disability for an unspecified period of not to exceed twenty-four months from and after October 11, 1953. By paragraph 1(c) he was to receive all expenses incurred by him for medical, surgical, hospital and other treatment in respect to his injuries. The amount is unspecified. By paragraphs 1(d), (e) and (f) it was provided that petitioner should receive judgment for his costs and disbursements and his attorney's fee and interest and penalty. None of these were fixed. Under paragraph 2 of the so-called judgment it appears that it was intended that further proceedings would be had in the matter. It would seem that this so-called judgment was not a judgment at all and was not final and lacked

sufficient certainty to support a writ of execution. (See 30-A, Am. Jur. Section 57, where it is stated that it is the fundamental rule that a judgment should be complete and certain in itself and that a failure to comply with this requirement may render a judgment void for uncertainty.)

Assuming, for the purpose of argument, that the judgment of the Court entered October 11, 1954 was sufficiently certain to support a writ of execution, it is apparent that the order entered by the Court in the Budke case on December 10, 1958, is not a "final decision" within the meaning of Section 1291 of Title 28, U.S.C., and thus it is not appealable. (See cases cited in Note 102 under Title 28, Section 1291, U.S.C.A. in the main volume and in the pocket parts. In particular see *Gillespie v. Schram,* 108 F.(2d) 39, 43, and *Clinton Foods v. United States,* 188 F.(2d) 289, 291, *certiorari* denied, 342 U.S. 825; *Hohorst v. Hamburg-American Packet Company,* 148 U.S. 262; *Collins v. Miller,* 252 U.S. 364, 370; *Oneida Nav. Corp. v. Job & Co.,* 252 U.S. 521, 522; *Arnold v. Guimarin & Co.,* 263 U.S. 427, 434, which were to the effect that "a final decision", in the sense required in order that it is appealable, is one that puts an end to the suit, deciding all the points in litigation, leaving nothing for judicial determination but enforcement by execution or other process.) Whichever way the District Court might have ruled on the show cause proceeding, the ruling would not have settled the controversy between the plaintiff-appellant and Northwest, the owner of the property and the appellee herein. Had the Court

ruled in appellant's favor and issued the so-called "special execution", plaintiff intended to sell the property at Marshal's Sale and thereafter to litigate his rights to possession of and title to the property, in an independent proceeding (see affidavit of Mr. Tallman, R 20, which was presented with Budke's motion for order to show cause). Even if the Court had ordered issuance of the "special execution" and if that execution had been levied upon the property, Budke would still have been required to comply with the provisions of Title 55-9-84, A.C.L.A. 1949, relative to proceedings upon a third party claim. A "special execution" at common law was defined as one which pointed out and specified the property to be sold and which followed the judgment in respect of the disposition of the proceeds arising from the sale. (21 Am. Jur. Executions, Sec. 17.) A special execution, as such, is unknown in Alaska practice. However, the Alaska statute with reference to executions (55-9-73, A.C.L.A. 1949, First Section), provides for executions of this type. A mere reading of the judgment in the Budke case (R 3) will disclose that it was not a judgment which directed the sale of any specific property or provided for application of the proceeds on an execution sale. It is interesting to note that Budke had already had a "special execution" and had tried to sell the specific property herein concerned even though his judgment did not direct the sale of that property or of any property. The execution issued on November 21, 1957 (R 5) directed the marshal to levy upon and to sell the property herein concerned if

sufficient personal property belonging to the employer could not be found. Under that execution the marshal levied upon the property and noticed it for sale and then released it from the levy when Northwest filed a third party claim to the property and Budke failed to post the indemnity bond required by 55-9-84, A.C.L.A. 1949 (R 16). Had the District Court ruled in Budke's favor on the show cause proceedings, the order would have availed Budke nothing. The controversy as to ownership of and right to possession of the property would have remained and would have had to be finally resolved by additional litigation.

On the other hand, the ruling made by the Court has not finally settled anything between Budke and Northwest. Budke, if he so desires, could again request an execution against any property belonging to the employer. If under that execution the property herein concerned should be seized by the Marshal the property would again be released upon filing of third party claim unless indemnity bond was furnished by Budke as required by the statute. The title to and the right of possession of the property would still need to be settled in another proceeding. That other proceeding is presently pending in the District Court, No. A-15,271, an action for "strict foreclosure" commenced by Northwest and its successors as plaintiffs against Budke as defendant. The action seeks to have Budke establish his claim to the property, if any, to determine priorities, and to set a date for redemption by Budke if his claim should be established. (As to "strict foreclosure" actions see *Sears Roebuck &*

Company v. Camp, 1 At.(2d) 425, 118 A.L.R. 762 and annotation entitled "Strict foreclosure as remedy where claimant of title, interest, or lien subordinate to mortgage was not made party to prior judicial foreclosure and sale", 118 A.L.R. 769, and cases there cited.) This appeal can accomplish nothing in settling the rights of the parties whichever way it is decided.

Getting down to the merits of the controversy, and as an alternative in the event the court does not rule that this appeal should be dismissed, appellant claims in his brief that the judgment in the Budke suit became a lien on the specific property herein concerned and that accordingly he is entitled to have an execution issued by the District Court which would specifically direct it be levied upon the property and that the property be sold at execution sale. He then intends to litigate the title of and the right of possession of the property in a subsequent proceeding. As we have previously pointed out, a subsequent action is presently pending before the District Court. That action will determine the rights of the parties. Budke has appeared in the action and all of the parties are before the court. The action is at issue.

Budke's claim to the property has never been judicially determined. Budke was a necessary party to the foreclosure suit if his claimed lien against the property was secondary and subordinate to the lien of the mortgage held by the First National Bank of Anchorage. If, as he claimed, his alleged lien was prior to the lien held by the bank, Budke was a proper, but not a necessary party to the foreclosure proceed-

ings (56-1-32, A.C.L.A. 1949). He was named as a party in the foreclosure suit as having a lien subsequent to the lien held by the bank. The Court has previously held (opinion April 4, 1956, 139 F. Supp. 346, 348, appendix attached to appellant's brief) that proper service was not made upon Budke and accordingly he was not made a party to the foreclosure suit and was not bound by the decree in that suit. However, the Court did not hold, as is claimed by appellant in his brief, that Budke had any interest at all in the property. The doctrine of res judicata, or the doctrine of merger, urged by appellant in his brief, neither one get to the matter. Budke was not before the court in the foreclosure proceedings and his rights, if any, were not litigated. The Court specifically declined to determine anything regarding Budke except that he was not properly before the Court and could not be bound by the foreclosure decree. The ruling of the District Court in its opinion dated April 4, 1956, should be considered as a whole and not piecemeal as appellant would have us do. Between the time of the entry of the decree in the foreclosure proceedings and the sale of the property at Marshal's sale, Budke appeared in the foreclosure proceedings. He never at any time filed an answer or offered to file an answer, as is required by law of a party who wishes to set aside a decree because he has not been properly served. He took part in the foreclosure proceedings over a period of several months from his first appearance. In those proceedings he maintained at all times that he had a prior lien against the property herein concerned by reason of the provisions of

43-3-5 A.C.L.A. 1949. Under that contention the Court held, and properly so, that while Budke was a proper party to the foreclosure proceedings that he was not a necessary party. The Court never passed on the merits of Budke's claim or his claim that he had a first and prior lien against the property. It accepted Budke's statement that he did have a first and prior lien against the property for the purpose of deciding the motion. Accordingly the Court refused to set aside the decree and reopen the matter for litigation of Budke's claim as it should properly have done if Budke had stated the true situation that his claim, if any, was secondary and subordinate to the claim of the mortgage held by the bank.

Appellant argues at page nine of his brief that he was originally entitled to a lien that was paramount and superior to any other lien upon the property. He quotes 43-3-5 A.C.L.A. 1949, and states that he argues the matter of priority of liens because the appellee has attempted to confuse the issues and has argued throughout the proceedings concerning priority of other liens. He argues that by the doctrine of merger and by the doctrine of res judicata, by some sort of magic which is not explained, his claim against the property, which as the record shows, could have been no better than a claim of fourth priority, has now assumed first place because the property has been sold in a proceeding to which Budke was not a party.

As a matter of fact it was demonstrated beyond question to the District Court and appears without question from the record which is before this Court,

that appellant had no lien whatsoever, prior or otherwise, against the property.

The lien allowed by 43-3-5 A.C.L.A. 1949, is effective only against property belonging to the employer *(Rivers v. Wiggins,* 15 Alaska 292) and only against that part of the property belonging to the employer upon which the injured employee was performing work in *construction, preservation, maintenance or operation at the time of the injury of the employee. (Hanson v. American Legion Post No. 11,* 12 Alaska 332, 338.) The record stands without dispute (R 30) that the employer never had any interest in the property. Budke had full opportunity to show to the District Court, if he could, that the employer had an interest in the property to which a lien could attach. He made no showing. Budke was injured in an automobile belonging to his employer. His lien claim might have been effective as against the automobile but that is as far as it could go. The statute requires that a person claiming a lien under the statute shall within four months after the date of the injury file for record a notice of lien which shall contain a "description of the property affected or covered by the lien so claimed". The lien claim filed by Budke did not describe the property. For that matter it did not describe any specific property (see Appendix 1 attached to this brief). Furthermore, the statute requires that in the event a lien is claimed, in order to perfect the lien, a suit in equity must be commenced within ten months after the cause of action shall arise. Appellant never commenced an action to foreclose his alleged lien. It

is manifest that appellant does not have any lien against the property under the provisions of the Workmen's Compensation Act.

Appellant at page seven of his brief claims that he had a judgment lien against the property herein concerned. He quotes 55-9-61 A.C.L.A. 1949, in support of that claim. (The statute quoted by appellant as being 55-9-61 A.C.L.A. 1949 is actually the statute as amended in 1955, S.L. 1955, Ch. 52, page 130, effective six months after the entry of the judgment in the Budke case.) However, and as we have previously shown, the employer never had any interest in the property herein concerned. Accordingly, under the provisions of 55-9-61, A.C.L.A. 1949, even including the amendment made in 1955, appellant had no lien against the property herein concerned. A judgment lien attaches only to real property "of the defendant".

Furthermore, even if it were conceded that Budke had a lien against the property, such lien at best was a fourth lien. The mortgage lien and the liens of the United States for taxes and the liens of the Territory of Alaska for taxes were all recorded prior to the docketing of the judgment in the Budke case.

Under the decree of foreclosure and the purchase of the property by Northwest at marshal's sale and upon conveyance of the property to Northwest by the United States Marshal, as the result of the foreclosure sale, Northwest and its successors have succeeded to the rights of the corporation as owner of the property and of the First National Bank of Anchorage, mortgagee, and of the other parties holding liens prior to

Budke's claim (37 Am. Jur. Mortgages, Sec. 747, page 168). Budke's only right as against Northwest, and against its successors, is the right to redeem the property, if in fact he has any right at all. The strict foreclosure suit will give Budke his "day in court". It will allow him to establish his claim if he has one. It will allow him to establish the priority of any claim he may prove. It will allow him to redeem the property from prior claims if he desires to do so.

Appellee has been unable to follow the arguments made by appellant in his brief (page fourteen) where he claims that certain unnamed real parties in interest have been unjustly enriched to the extent of $20,000. The record before the District Court disclosed that Budke had no claim at all against the property herein concerned. All parties were named in the show cause proceedings in the District Court. The real party in interest was the owner of the property, Northwest, to February of 1958, then Holmberg and Longoria, the owners after the conveyance to them by Northwest. Northwest paid $13,004 to the United States Marshal as the purchase price for the property at the Marshal's sale. If anybody has been negligent in not protecting his rights, that person is Mr. Budke. It would appear that his argument concerning unjust enrichment has no merit whatsoever.

In conclusion, it is apparent from the record that the judgment in the Budke case was never at any time a lien against the property. Furthermore it is apparent that appellant was not entitled to a lien against the property under the provisions of the Workmen's

Compensation Act and that he secured no lien against the property. Under the show cause proceedings the best that appellant could ever have received would have been a permission by the Court to execute on the property herein concerned. That procedure had already been tried by appellant and the execution had been released because appellant was unwilling to furnish a bond as required by law where a third party claim has been filed. Granting of plaintiff's motion in the proceedings on order to show cause would have been vain and useless and at best would have clouded the title to the property and would have resulted in a multiplicity of suits. The issue can best be determined by the pending proceeding before the District Court. In the show cause proceedings it was clear that Budke had no valid lien against the property. The District Court, on the record made before that Court, had no choice but to dismiss the show cause proceedings. Its action in ordering the dismissal of those proceedings was proper. This appeal should be dismissed by this Court for the reasons set out in this brief or in the alternative the action of the District Court should be affirmed.

Respectfully submitted, this 1st day of October, 1959.

DAVIS, HUGHES & THORSNESS,
By EDWARD V. DAVIS,
Attorneys for Appellee
Northwest Auto Sales, Inc.

(Appendix No. 1 Follows.)

Appendix.

Appendix No. 1

9447

John D. Budke
Claimant
vs.
Kaiser-Frazer Co. of Anchorage,

CLAIM OF LIEN

Workmen's Compensation Act of Alaska, Section 43-3-5, Lien to Secure Compensation.

Notice Is Hereby Given that the claimant, John D. Budke, sustained an industrial injury on October 11, 1953 while in the course of his employment with the Kaiser-Frazer Co. of Anchorage, Alaska. That at the time of said injury claimant was informed by his employer, the Kaiser-Frazer Co., that the company had permitted its industrial insurance coverage to lapse and therefore claimant could not receive medical treatment and compensation due him under the Alaska Workmen's Compensation Act.

Claimant received severe injuries to his back and spine, fracture of three ribs on the left chest and fracture of the coccyx and injury to the left leg. That claimant has been totally incapacitated since the time of injury and will be incapacitated for some time in the future and will also have a substantial permanent partial disability.

The claimant estimates that his medical expenses, time loss and disability award under the Alaska Workmen's Compensation Act will amount to at least $7,500.00.

Therefore the claimant is claiming a lien for such personal injuries, medical and hospital treatment to which he is entitled under the Alaska Workmen's Compensation Act, and particularly Section 43-3-5 and all amendments thereto, to secure compensation under the Alaska Workmen's Compensation Act in the sum of $7,500.00, together with his attorney fees, costs and interest from the date of his injury, and that said lien shall be placed upon all assets of the Kaiser-Frazer Co. at Anchorage, Alaska, including all buildings, fixtures, furniture, equipment, automobiles, bank accounts, franchise, which said Kaiser-Frazer Co. has, owns, controls, leases, or has an equitable interest in of said properties.

John D. Budke

State of Washington
County of King—ss.

John D. Budke, being first duly sworn upon oath, deposes and says:

That I am the lien claimant above named; that I have read the within and foregoing claim of lien, know the contents thereof and that the same is true.

John D. Budke

Subscribed and sworn to before me this 15 day of December, 1953.

Roy W. Jackson
Notary Public in and for the State
of Washington, residing at Seattle.

4/2 3.00

Anchorage Precinct, Anchorage, Alaska:
Filed for record Dec 17 1953 o'clock 11:25 A.M.
By Bell & Sanders Mail to: Box 1599
At Anch. Rose Walsh LA
District Recorder